Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1746

LAYMON WESLEY ALSBURY,

Petitioner,

vs.

THE UNITED STATES POSTAL SERVICE; E. T. KLASSEN, individually and as Postmaster General of the United States; WILLIAM J. SULLIVAN, individually and as Regional Postmaster, Western Region; JOHN M. NILES, individually and as Postmaster, Santa Barbara, California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Laymon Wesley Alsbury respectfully applies for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the Ninth Circuit, and in this behalf sets forth the following

facts and grounds for the issuance of that writ:

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported; the opinion of the District Court for the Central District of California, reported at 392 F.Supp 71; and the administrative letters suspending and discharging Petitioner from the United States Postal Service, the analysis and opinion by the hearing officer, and the administrative letters affirming Petitioner's suspension and discharge all appear in the Appendices hereof.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1976. No petition for rehearing was filed. This petition for certiorari will be filed on or before June 1, 1976 timely under Rules 22 and 34 and 28 U.S.C. sec. 2101(a). This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner received the Due Process equivalent of a pretermination hearing, when he was suspended without pay and discharged from his Post Office job because he had been accused by postal inspectors of stealing postal property and where the local postmaster who suspended and fired him after affording Petitioner a chance to tell his side of the incident, was already of the fixed opinions that a person accused of wrongdoing was entitled to no credence on the subject of it, but that an accusation by postal inspectors should receive substantial weight, since postal inspectors were "impartial" and "our police force".

2. Whether Petitioner's posttermination hearing accorded with Due Process when it was not conducted as a de novo proceeding but rather one to determine if any substantial evidence could be adduced, after the fact, to support the original decision of the local postmaster to fire Petitioner.

3. Whether Petitioner's hearing met the requirements of Due Process, where, after two days of testimony, the hearing officer wrote a lengthy summary of the

evidence and proposed findings of fact which he sent to the administrative official who would decide Petitioner's appeal and who had no other information about the testimony, but Petitioner was not allowed to object, add to, modify or even see these documents, despite his prior written request for a copy of the recommendations, until after his case had been decided.

4. Whether the Post Office was bound by principles of collateral estoppel to pay Petitioner his salary through the time his administrative discharge became final, where his salary had been suspended on the express ground that there was cause to believe he had committed a felony, and where Petitioner had meanwhile been tried in a federal court on that identical charge at the special request of the Post Office and with the prosecutorial assistance of its inspectors, and had been acquitted on the merits before the administrative hearing began.

STATUTES AND REGULATIONS

39 U.S.C. sec. 410 provides in relevant part:

> Application of other Laws.--(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [5 USCS §§ 501-576, 701-706, which includes the Administrative Procedure Act], shall apply to the exercise of the powers of the Postal Service.
>
> ". . . ."

Postal Office Manual Part 444, Section 444.32 provides in relevant part:

> Procedures for Adverse Actions (Discharges, Furloughs Without Pay or Reductions in Rank or Pay

Whenever it is proposed to take adverse action against an employee, the responsible official shall follow the procedures set forth in this subsection:

a. Notice.--The installation head or his designee (in other offices, a manager or above in title) shall serve the employee with a written notice of the proposed action and the reasons therefor, a copy of any charges preferred against him, and instructions for response. The notice shall be served at least 30 days in advance of the proposed action.

b. Response.--The employee may respond to the notice, in writing, in person, or both, and present any affidavits within 10 days from receipt of the notice.

c. Decision.--The installation head or his designee (in other offices a manager or

or above) shall consider the employee's response, if any, and shall render a written decision after the expiration of the employee's time limits to respond but no later than 20 days from the date of that notice. The decision shall set forth the reasons for the decision and, if adverse to the employee, it shall inform the employee of his appeal rights (including Veterans Preference appeal procedures, if applicable).

d. Duty Status.--The employee shall, unless otherwise provided herein, remain either on the job or on the payroll at the option of the employer for a period of 30 days from the receipt of notice. Thereafter, the employee shall remain on the rolls in a non-pay status until disposition of his case through the

grievance and appeal procedure.

e. Exception.--When there is reasonable cause to believe an employee guilty of a crime for which a sentence of imprisonment may be imposed, the advance notice requirement shall be reduced to 24 hours. The employee shall have the opportunity to answer the letter of proposed action within that 24-hour period. At the expiration of the 24-hour period, a letter of decision shall be issued forthwith. Thereafter the employee shall remain on the rolls in a non-pay status until a final adminstrative decision is made regarding his employment status with the Postal Service.

Post Office Manual Part 444, Section 444.34 provides in relevant part:

Upon receipt of a letter of decision regarding an adverse

action, the employee may invoke the following grievance and appeal procedure:

a. Step I

(1) Field Employee(excluding all employees of the Inspection Service)

(a) A field employee, whether or not administratively responsible to the Regional Postmaster General, may appeal by submitting a written request for a hearing within 15 days from the effective date of the adverse action. Such appeal shall be made to the next higher level of management (superior to the official taking the action) which is at least a manager or above. A copy of the appeal will be sent to the official taking the action who will forward the case to the appropriate

official. The appeal must include the employee's name, title, grade level, location, and basis for the appeal.

(b) The official reviewing the case shall take one of the following two actions:

(i) Reverse the decision and advise the employee withir 7 days after receipt of the appeal.

(ii) Forward the case to the Regional Postmaster General or his designee (Step I official), and request that a hearing be arranged. [For other field organizations which are not in the Regional Organizational Structure, forward the case to the Assistant Regional Postmaster General, Employee and Labor Relations (Step I Official).]

" . . . . "

(3) Hearings

(a) A Hearing Officer will be assinged by the Step I Official. The hearing shall be conducted, normally within 15 days from the date the Step I Official receives the appeal. Hearings normally will be held at the installation in which the employee is located. The employee, normally, shall receive 7 days advance notice of the hearing. Conduct of the hearing shall be as informal as is consistent with an orderly presentation of the case. While the hearing will not be limited by legal rules of evidence and procedures, testimony shall be within reason-

able bounds of relevancy and materiality.

(b) The employee and the employer have the right:

(i) to be present at the hearing;

(ii) to be represented (If the employee elects to be represented, he may select a person of his own choosing and he shall so advise the Hearing Officer or the Step I Official in advance of the hearing.); and

(iii) to present evidence, call witnesses and cross-examine witnesses. (Only one witness is to be present at a time.)

(c) The employee, his representative and his witnesses, if they are Postal employees and in a pay status at the time

of the hearing, shall be compensated for straight time hours spent at such hearing provided they are part of their regularly scheduled work day.

(d) The employee, witnesses and representative shall have freedom from restraint, interference, coercion, discrimination or reprisal.

(e) The Hearing Officer will prepare a summary of the hearing and findings of fact which will be forwarded to the Step I Official, normally, within 7 days from the date of the hearing. The case will be reviewed by the Step I Official and a written decision shall be due within 15 days of the hearing date. The decision letter will include the reasons for the decision

and a copy of the findings of fact provided by the Hearing Officer.

b. Step II

An employee may appeal in writing within 15 days of receipt of the Step I decision to the Postmaster General or his designee with a copy to the Step I Official. (Appeals will be addressed to the Postmaster General, c/o the Senior Assistant Postmaster General, Employee and Labor Relations Group, U.S. Postal Service, Washington, DC 20260.) Upon receipt of a copy of the appeal, the Step I Official will forward the file to the Senior Assistant Postmaster General, Employee and Labor Relations Group. The case will be reviewed and a written decision sahll be due within 15 days of the receipt of the appeal. The decision is final.

" . . . . "

The portion of the Fifth Amendment to the Constitution of the United States involved in this petition is:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner worked for the Postal Service for 12 years, rising from letter carrier to manager of the "Mojave Section" an administrative area comprising much of California. He made improvements in equipment allocation and mail service, introduced a form of zero-budget planning, ran his section in the black, saved $150,000 out of a $4 million section budget, and experienced unfortunate labor relations. In the summer of 1973 he was promoted to a position with less operational responsibility in Santa Barbara. [Clk Tr 43-44; Adm Tr 137, 143-144].

When he moved from Mojave to Santa Barbara, Petitioner transferred some office furnishings which he intended to use in his new office, e.g., a set of postal manuals, a picture of President Nixon, a bookcase, a cassette tape recorder, and a window air conditioning unit [Clk Tr 44-45].

After Petitioner ceased to be in charge there, postal inspectors were invited to Mojave to see if anything was missing. After a couple of days of talking to the employees there, they decided that the items Petitioner took had been

improperly removed. They followed Petitioner to Santa Barbara and confronted him with the accusation of stealing postal property. Shaken by a four hour interrogation and the threat of prison Petitioner made a special trip to the Mayflower warehouse, where his effects were still in storage, withdrew his office items, and turned them over to the Post Office in Santa Barbara, where he was already beginning his new assignment. [Clk Tr 45-46; Adm Tr 42-46, 51-57, 63, 168, 172-173; Adm Rec 39-40].

About three weeks later, the same postal inspectors, aware that everything had been returned [Adm Tr 69] testified before a federal grand jury in Fresno. They were the only witnesses. They obtained an indictment charging Petitioner with violating 18 U.S.C sec. 1707 ("Embezzlement of Property Used by U.S. Postal Service", a felony). The indictment was limited to the bookcase, tape recorder and window air conditioning unit, all of which had been previously turned in [Clk Tr 46, 52]. The postal inspectors phoned the Santa Barbara Postmater (Niles) about the incident. Petitioner had already discussed with

Niles the fact that he had been wrongfully accused of taking the property which he had turned over to Niles. However, Niles felt tht accused people could never be believed on the subject of what they were accused of doing, while the "impartial" postal inspectors, by contrast, were "our police force". The fact of the indictment was also entitled to weight, he felt. [Adm Tr 95, 100]..

Niles began writing Petitioner formal letters, advising him of his right to tell his side of things, as if Niles had never discussed the matter with Petitioner; actually they had talked about Petitioner's plight (and his innocence) several times before, once for 30-45 minutes [Adm Tr 91-92]. At the shortest allowable notice (24 hours) Niles suspended Petitioner,then fired him.

At the criminal trial the same two postal inspectors assisted the U.S. Attorney in prosecuting the case. One of them was designated as the assigning officer and allowed to sit at the counsel table, although all other witnesses were excluded until they testified. The United States Postal Service assisted the prosecution in putting the case

together and presenting witnesses. The case was decided on the merits: i.e., the jurisdictional value of the property in question, and the fact that it was post office property were not disputed. The defense was that the Petitioner took the property to use in his office, not for a felonious purpose. After a two day trial the jury acquitted Petitioner [Clk Tr 46].

A couple of weeks later the Post Office began its administrative hearing, charging Petitioner with stealing ("misappropriation") the same three items mentioned in the indictment [Adm Tr 1]. It also lasted two days and involved the same two postal inspectors and virtually the same evidence as the criminal trial [Clk Tr 2, 15, 31-32]. There was no court reporter. There was a tape, but it was not transcribed until months after the administrative proceedings were finished [Clk Tr 139-140; Adm Tr, last page(unnumbered)]. The hearing officer prepared a lengthy summary of what the witnesses said, together with his recommendations, analysis and opinion. He forwarded these to the administrative officer who would decide Petitioner's

appeal. Although Petitioner's lawyer had requested a copy of the recommendations, these were not made available to Petitioner until the case had been decided, and most of it [Adm Rec 1-25, 32-36] was not turned over to Petitioner until the parties were in the district court, just before the ruling granting summary judgment [Clk Tr 33, 35, 134-135, 139-140]. The administrative officer actually making the decision did not have access to the tape, had not been present at the hearing, and had no information as to the testimony other than the summary which he received from the hearing officer [Clk Tr 139-140].

Although the hearing officer had conducted the hearing as if it were being decided on the basis of a preponderance of the evidence, never hinting the contrary, he actually judged the case (and wrote his analysis and recommendations) on the basis that the hearing was governed by the "substantial evidence test," i.e., that if any evidence could be found supporting the original decision of Postmaster Niles (to suspend and fire Petitioner) that decision must be affirmed. [Adm Rec 33; also see Appendix E herein].

The hearing officer found the necessary "substantial evidence" and recommended that the original action of Postmaster Niles be sustained. The administrative officer authorized to decide Petitioner's appeal sustained everything Niles had done. The Postmaster General did the same.

Petitioner sued in the district court for declaratory and injunctive relief (reinstatement and back pay). Jurisdiction in that court was based on 28 U.S.C. secs. 1331, 1339 and 1343(4); 39 U.S.C. secs. 401(1) and 409(a); 5 U.S.C. secs. 702 and 703 (sec. 702 was incorrectly designated in the complaint as sec. 602). The district court granted summary judgment for defendants.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SUBSTANTIAL AND REPETITIVE QUESTIONS CONCERNING THE MINIMUM DUE PROCESS REQUIREMENTS OF THE POSTTERMINATION HEARINGS ALLOWED POSTAL EMPLOYEES, AND CONFLICTS IN PRINCIPLE WITH THE RECENT DECISION OF THIS COURT IN ARNETT V. KENNEDY.

In Arnett v. Kennedy, 416 U.S. 134 (1973) this Court held that the federal employee's discharge under the Lloyd-La Follette Act (5 U.S.C. sec. 7501) "for such cause as will promote the efficiency of the service," was adequately protected by a posttermination evidentiary hearing.

The present case goes to the heart of what a "hearing" is. Unlike many federal agencies, the Post Office is excused from the Administrative Procedure Act, by 39 U.S.C. sec. 410(a). The only rules governing the hearing allowed to a postal employee are those laid down in the Postal Manual. The differences are (to us) stunning. The Adminstrative Procedure Act provides that the proponent of an order has the burden of proof (generally understood to mean proof by a preponderance of evidence), that the

hearing officer makes the initial decision or recommended decision, and that the parties have an opportunity to submit for the consideration of those who make the final decision their own proposed findings and conclusions, their exceptions to decisions or recommendations, and their reasons; the record which goes up must include not only exhibits, but a transcript of testimony. 5 U.S.C. secs. 554(d), 556(d), 557(b) and 557(c). By contrast, the Post Office Manual makes no provision for a burden of proof. Without saying so in the rules, the Post Office (in this case and presumably others) substitutes a substantial evidence test. The hearing officer specifically defined the rule he was applying by reference to Chavies v. Finch, 443 F.2d 356 (9th Cir. 1971). The "substantial evidence" doctrine is explained in Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3rd Cir. 1971), cert. denied, 402 U.S. 976, reh. denied, 403 U.S. 912, which defines "substantial evidence" as the minimum evidence which a reasonable man would accept as sufficient to support a conclusion. It is more than a "mere scintilla" but may be less than a

preponderance. The rule is one applied by courts to adminstrative proceedings which are themselves supported by a full evidentiary hearing. But the Post Office hearing officer applied the substantial evidence test to the action of Postmaster Niles, who suspended and fired Petitioner, and who never conducted any kind of evidentiary hearing before doing so.

The administrative officer who nominally decided Petitioner's administrative appeal did not expressly refer to the substantial evidence test. He "affirmed" Postmaster Niles, because the charges against Petitioner were "supported by a preponderance of record." Presumably this adds nothing to the substantial evidence test, since this official had no record of the testimony of any witness except for the summaries supplied by the hearing officer.

Both the district court and the Ninth Circuit approved the substantial evidence test in reviewing this case.

The summary of testimony supplied by the hearing officer was never made available to Petitioner until he was in district court. Petitioner's lawyer never had a chance to suggest additions or mod-

ifications or to object to the summary. The lack of a transcript might not have been significant, provided there had been an opportunity to make these objections. The tape could have been brought out of storage and utilized to settle any differences. But since the summary was never supplied until the parties were in the district court there was no way to do this. As a matter of fact, there were substantial objections to the summary when Petitioner was finally privileged to read it. (These were briefed for the Ninth Circuit and will not be reiterated here, nor will we belabor the obvious reasons why the accuracy of such a transcript was crucial to Petitioner at that point in his administrative appeal.

If the substantial evidence rule were proper in an evidentiary hearing, the employee's lawyer would have no role except (possibly) to cross-examine. Once the agency had produced "substantial evidence" justifying its actions, the hearing officer would <u>have to</u> affirm whatever the agency had done, notwithstanding that a preponderance of the evidence might persuade him to an opposite conclusion. Under that test, there

would be no point in the employee even putting on a case. He might persuade the hearing officer, but what could he accomplish, once the agency had produced "substantial evidence"?

We suggest that an evidentiary hearing decided on substantial evidence is not a hearing within the meaning of due process, and that a decision based on a summary form of "transcript" which the parties are prevented from reading is equally deficient. That in turn means the Post Office rules are constitutionally invalid, and the action of both courts below, which found for the Post Office because Petitioner had received the "benefit" of all applicable rules, should be set aside.

A hearing should be granted not to set Petitioner's career to rights but to bring Post Office procedures affecting thousands of employees into accord with due process.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS ABOUT THE BINDING EFFECT OF A CRIMINAL ACQUITTAL IN A SUBSEQUENT ADMINISTRATIVE PROCEEDING, CONCERNING WHICH DECISIONS OF THIS COURT ARE IN

APPARENT CONFLICT.

This Court has held several times that under certain circumstances, a prior criminal acquittal may be binding on the government in a later case (not criminal) between the same parties. The leading case is Coffey v. United States, 116 U.S. 436, 443-445 (1886), in which the successful defendant kept his brandy safe from forfeiture. The same reasoning was applied in Chantangco v. Abaroa, 218 U.S. 476, 481 (1910), when defendant's prior acquittal of a criminal charge precluded civil liability based upon actual guilt of that crime.

The contrasting and better known rule is that of Helvering v. Mitchell, 303 U.S. 391 (1938), which is simply that a criminal acquittal is not generally binding in a later civil action, because of the obvious differences in burden of proof.

However, the Coffey rule is by no means dead, but is often referred to (and never squarely applied) in such cases as One Lot of Emerald Cut Stones v. United States, 409 U.S. 232 (1972), and United States v. U.S. Coin and Currency, 401 U.S. 715 (1971).

A resolution of these apparently contradictory lines of cases is important because federal employees are often fired for having done something which would constitute a crime, and in many of those cases the employee who is fired has already been acquitted of that crime. Typically the agency which fired him is really the same agency which prosecuted the criminal action, notwithstanding that the United States Attorney's office handled the matter in the courtroom. The problem does not seem to require rejecting one line of cases or the other, but does require some formulation of when the Coffey rule should apply. In the present case, Petitioner was suspended under a rule which allowed suspension on 24-hour notice where there was reasonable cause to think that he was guilty of a felony; otherwise he was entitled to be paid, whether or not he was allowed to continue to work. The Post Office was the de facto prosecutor, and the Post Office lost. That matter has been adjudicated between the parties.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

John M. Sink
1114 State Street #249
Santa Barbara, CA 93101

Lawyer for Petitioner

Date: May 28, 1976

APPENDIX A

Administrative Letter Looking Toward Petitioner's Suspension from Postal Service Job Without Pay

JHN:vb
Suspension

September 20, 1973

Mr. Laymon W. Alsbury
5192 San Lucas Way
Santa Barbara, CA 93111

Dear Mr. Alsbury:

This letter rescinds my letter to you dated September 17, 1973 proposing your indefinite suspension. The following is submitted in lieu of that letter.

This is advance written notice looking forward to your indefinite suspension from the Postal Service effective 24 hours from the time of your receipt of this letter. This action is being taken because there is reasonable cause to believe that you have committed a crime for which a sentence of imprisonment may be imposed. Specifically, it is alleged that during the period of time that you were Officer in Charge of the Mojave, CA Post Office, which was from October 5, 1972 through July 2, 1973, you unlawfully removed from

the custody of the U.S. Postal Service at Mojave, CA a Fedders Air Conditioning unit, a Realistic Cassette Recorder and a wooden bookcase. Subsequently you were, on September 13, 1973, indicted by the Federal Grand Jury at Fresno, CA for violation of Title 18, Section 1707, U.S. Code, a felony.

You may review the material relied on to support the reasons for this notice at my office at 836 Anacapa Street, Santa Barbara, CA 93102. If you do not understand the reasons for this notice, contact me for further explanation. You may answer this notice either in person or in writing or both, to me at 836 Anacapa Street, Santa Barbara, CA 93102, during normal business hours. Your answer must be received by me within 24 hours from the time of your receipt of this letter.

You may also furnish written affidavits to me within the same time limit. You will receive a written decision after you have had an opportunity to reply and as soon as possible after the expiration of the 24-hour period.

John M. Niles
OIC-Acting SCM

APPENDIX B

Administrative Letter Suspending
Petitioner Without Pay

UNITED STATES POST OFFICE
Santa Barbara, CA 93102

Our Ref: JMN:vb Date: September 22,1973
Subject: Suspension POCL: 1

To: Mr. Laymon W. Alsbury
5192 San Lucas Way
Santa Barbara, CA 93111

This is my decision to suspend you indefinitely from the Postal Service effective immediately pursuant to my advance notice of September 20, 1973.

I have given full consideration to your attorney's letter of September 18, 1973. This was the only communication I have received from you concerning the then proposed suspension. I find that the charge that there is reasonable cause to believe you have committed a crime for which a sentence of imprisonment may be imposed, as stated in the notice of September 20, 1973, is fully supported by the evidence and warrants your indefinite suspension. This action is being taken to promote the efficiency of the service.

You have the right to appeal this decision in writing to Mr. G. B. Hartsook, District Manager, San Bernardino District Office, P.O. Box 3399, San Bernardino, CA 92413, within fifteen days from the effective date of this action. You should furnish me a copy of your appeal, and in your appeal you should state whether you do or do not wish a hearing. You are entitled to a representative of your own choosing throughout your appeal. If you choose a representative who is a postal employee and he is otherwise in a duty status, he shall be afforded a reasonable amount of official time for preparation of your case.

John M. Niles
OIC-Acting SCM
Santa Barbara, CA 93102

APPENDIX C

Administrative Letter Looking Toward Petitioner's Removal from Postal Service

UNITED STATED POST OFFICE
Santa Barbara, CA 93102

Our Ref: JMN:vb Date: October 12,1973
Subject: Removal POCL: 1
To: Mr. Laymon W. Alsbury
5192 San Lucas Way
Santa Barbara, CA 93111

This is advance written notice looking forward to your removal from the Postal Service effective November 16, 1973.

This action is based on the following charges:

1. Misappropriation of Air Conditioner. During the month of June 1973 you unlawfully removed from the custody of the U.S. Postal Service at Mojave, CA, a Fedders Air Conditioning Unit, Serial #HE639028.
2. Misappropriation of Cassette Recorder. During the period of time that you were Officer in Charge at the Mojave, CA Post Office, which was from October 5, 1972 through July 2, 1973, you unlawfully removed from the custody

of the U.S. Postal Service at Mojave, CA, a Realistic Cassette Recorder.

3. Misappropriation of Bookcase. During the period of time that you were Officer in Charge at the Mojave, CA Post Office, which was from October 5, 1972 through July 2, 1973, you unlawfully removed from the custody of the U.S. Postal Service at Mojave, CA, a wooden bookcase.

You may review the material relied on to support the reasons for this notice at my office in the Main Post Office, 836 Anacapa Street, Santa Barbara, CA 93102. If you do not understand the reasons for this notice, contact me for further explanation.

You may answer these charges within ten days from your receipt of this letter, either in person or in writing, or both, before me during normal business hours at my office in the Main Post Office Building at 836 Anacapa Street, Santa Barbara, CA.

You may also furnish written affidavits to me within ten days of your receipt of this letter.

You will be afforded a reasonable amount

of official time for the above purpose if your are otherwise in a duty status.

You will receive a written decision after you have had an opportunity to reply and within twenty days of this notice.

John M. Niles
OIC-Acting SCM
Santa Barbara, CA 93102

APPENDIX D

Administrative Decision Letter Removing Petitioner from Postal Service

JMN:vb
Removal

October 30, 1973

Mr. Laymon W. Alsbury
5192 San Lucas Way
Santa Barbara, CA 93111

This is my decision to remove you from the Postal Service effective November 16, 1973 pursuant to my advance notice of October 12, 1973.

I note that you did not answer the letter in person. In reaching this decision I have given full consideration to your written answer of October 23, 1973 which was submitted in your behalf by your attorney. I find, however, that charges - 1. Misappropriation of Air Conditioner, 2. Misappropriation of Cassette Recorder, and 3. Misappropriation of Bookcase, stated in the notice of October 12, 1973 are fully supported by the evidence and warrant your removal.

You have the right to appeal this decision in writing to Mr. G.B. Hartsook, Manager,

Santa Barbara District, U.S.P.S., 3908 State Street, Suite 202, Santa Barbara, CA 93199, within fifteen (15) days of the effective date of this action. You should furnish me with a copy of your appeal and in your appeal you should state whether you do, or do not, wish a hearing. If you appeal this action prior to the effective date, you will remain on the rolls, but in a non-pay status, until disposition of your case has been had either by settlement or thorugh exhaustion of your Postal Service appeal rights.

You are entitled to a representative of your own choosing throughout your appeal. You and your representative, if he is a postal employee, shall be afforded a reasonable amount of official time for preparation of your case if you and/or your representative are otherwise in a duty status.

John M. Niles
OIC-Acting SCM
Santa Barbara, CA 93102

cc: Mr. John M. Sink, Lawyer

APPENDIX E

In the Matter of:	)	Case No. SF 112-D
LAYMON W. ALSBURY	)	
Appellant	)	ANALYSIS OF CASE
and	)	AND
UNITED STATES POSTAL SERVICE	)	HEARING EXAMINER'S
Employer-Appellee	)	RECOMMENDATIONS

The subject hearing involved some very complex fact situations and difficult questions of law. The total evidence received encompassed approximately ten hours of recorded testimony and arguments. In addition, post hearing briefs were requested and submitted by the parties. Because of the complexity of the case, the serious nature of severing an employee from his life time occupation, and the outstanding job of presentation by council for both parties, the "Summary of Hearing" is quite lengthy. The extensiveness of the summary however precludes the necessity of listening to ten hours of testimony in seeking an understanding of the case and the recommendations which follow.

ISSUE #1: Whether the indefinite suspension imposed upon the Appellant by the

U.S. Postal Service was for just cause and was proper under Section 444, et. seq. of the Postal Service Manual.

The United States Postal position relative to the suspension of Mr. Alsbury rests basically on three (3) points...(1) the indictment of Laymon W. Alsbury under Title 18, USC, para 1707, "Theft of Property Used by Postal Service" (a felony) (2) the provision of Part 444.32(e), Postal Service Manual, and (3) the investigation conducted by Postal Inspectors and their two Investigative Summaries.

The facts are undisputed that Mr. Alsbury did cause to be removed from the Mojave California Post Office and shipped to Santa Barbara, California, three items of Postal property, to wit: A Fedders Air Conditioning Unit; a Realistic Tape Recorder; and a wooden book case. It is further undisputed that he was indicted by a Federal Grand Jury under Title 18, USC, Para 1707, a felony statute. Under said indictment he faced potential imprisonment of up to three (3) years. It is true he was subsequently acquitted of the charges following a trial in Fresno, CA., but at the time Mr. Alsbury was suspended,

OIC-Acting SCM John M. Niles, only knew of the indictment. Upon issuing the letter of proposed suspension, Mr. Alsbury was given an opportunity to rebut the charges but no rebuttal was forthcoming.

Mr. Niles also received from Postal Inspectors Howe and Huggins, two (2) investigative Summaries regarding the actions of Appellant in Mojave, CA. It was undisputed that Mr. Alsbury did remove three (3) items of capital equipment from that office, without authorization, which items were subsequently (August 29, 1973) returned to the Postal Service by Mr. Alsbury.

ISSUE #2: Whether the discharge action taken by the U.S. Postal Service as against Appellant was for just cause.

Charge #1: Misappropriation of Air Conditioner
Charge #2: Misappropriation of Cassette Recorder
Charge #3: Misappropriation of Book Case

The Hearing Examiner, in hereafter considering each of the specific charges leading to the discharge of Laymon W. Alsbury, has applied the rule of

"substantial evidence" with respect to the burden of proof of the Postal Service (Chavies v. Finch, 443 F.2d 356...9th CIR. 1971).

At the conclusion of the hearing the Hearing Examiner requested the parties to submit legal briefs defining the term "misappropriation", the specific charge against Mr. Alsbury. As could well be expected, the parties defined the term quite differently and in accordance with their relative positions (see Hearing Examiner Exhibits #2 and #3).

The U.S. Postal Service defines "misappropriation" in this case as being wrongful exercise of dominion "over these three items for the purpose of making it subserve his own use or pleasure, or did exercise dominion over these items for a different purpose than that for which they were intended." The defense defined misappropriation as being tantamount to "theft" primarily by reliance upon the statutory language of Title 18, USC, 1707 and 1711. Based upon such definition, the defense then contended the U.S. Postal Service failed to meet the burden of proof relative to the "intent" of Mr.

Alsbury to commit "theft".

The definitions presented by both parties are certainly meritious although they could lead to opposite conclusions. Were "misappropriation" considered to be tantamount to "theft" the question of criminal intent would definitely arise. Certainly, some reasonable doubt would exist in the opinion of the Hearing Examiner as to whether such intent were shown to be present in the case of charges #2 and #3 (Realistic Tape Recorder and wooden book case.). However, in the case of Charge #1, relative to the Fedders Air Conditioning Unit, the element of intent becomes more clearly defined by the U.S. Postal Service and less clearly explained away by the Appellant.

Mr. Alsbury fully admitted to removing the subject air conditioning unit from the Mojave Post Office with the announced intent of having it "checked" for workability. Without having it checked, in fact, he caused it to be stored on his premises and co-mingled with his personal property. At the time such action was taken, he had not been removed from his position of OIC in Mojave CA., and had

not received a new work assignment. Inasmuch as he did not know that he would be assigned to the Santa Barbara Post Office, he had no way of knowing what air conditioning needs might exist in that office. As a result, his explanation for retaining the air conditioning unit defies reasonableness. Additionally, the said air conditioning unit was co-mingled with his own personal property and shipped from Mojave, CA., by Mayflower Van Lines on August 14, 1973, (Grievant's Exhibit #2). Yet, on August 23, 1973, nine days later, he represented to Postal Inspectors Howe and Huggins that the air conditioning unit was still in his garage in Mojave, CA. According to the testimony of the Postal Inspectors, he also advised him the subject air conditioning unit was "junk" which he intended to surplus and sell for the benefit of the U.S. Postal Service. He now denies that testimony and alleges to the contrary that he intended to utilize the unit in his new Post Office assignment. The statements of the Postal Inspectors, together with the written statement of Mr. Alsbury (Grievant's Exhibit #3) tend to support and give credence to the U.S. Postal Service

position that Mr. Alsbury intended to appropriate the air conditioning to his own purpose. Irrespective of the definition of "misappropriation" utilized in this case, there would appear to be at least "substantial evidence" with the relationship to the intent of Mr. Alsbury to appropriate to his own use the air conditioning unit.

If we utilize the definition of U.S. Postal Service relative to the word "misappropriation", a more clear distinction can be drawn in this case. In common usage, the word "misappropriation" is generally considered to be something less than "theft". There is no reason to assume each and every Postmaster in the U.S. Postal Service should be required to utilize legal nuances with respect to definition of words. By considering misappropriation as being something less than theft, the evidence in this case becomes more substantial as against Mr. Alsbury. As to each charge, we find Mr. Alsbury admittedly removing from the Mojave Post Office, without authorization and contrary to the Postal Manual with which he was familiar, the three items of

capital equipment. By his own admission he failed to advise any management authority of his action or his intent with respect to said items. He further admitted that had he been the successor Postmaster in Mojave, he would expect to know that items such as a tape recorder were being removed from that office. As suggested in the U.S. Postal Service brief, (page 4) "although a removal of Postal property belonging to one installation may seem heinous if the intent of the remover is to reuse the materials in a new duty station such an action taken without proper authorization,...constitutes misappropriation."

It is the opinion of the Hearing Examiner that irrespective of the definition of "misappropriation" utilized in the case, the Postal Service met the "substantial evidence" burden of proof with respect to the Fedders Air Conditioning unit. By utilizing the USPS definition of "misappropriation", which the Hearing Examiner concludes is most appropriate in this case, the Postal Service has met its burden of proof with respect to all three (3) items of capital equipment. It is there-

fore recommended that the discharge of Laymon W. Alsbury be approved and sustained.

Respectfully submitted:

DON R. FREEBAIRN
Hearing Examiner
January 30, 1974

APPENDIX F

Administrative Letter Affirming
Petitioner's Suspension and Firing

UNITED STATES POSTAL SERVICE
U.S. MAIL
WESTERN REGION
San Bruno, CA 94099

Mar 25, 1974
Mr. Laymon W. Alsbury
5192 San Lucas Way
Santa Barbara, CA 93111

Dear Mr. Alsbury:

This office has completed its examination of your appeal from the decisions of the then Officer-In-Charge at the Santa Barbara, California Post Office as outlined in his letters dated September 22, 1973 and October 30, 1973.

A careful review has been made of the entire case file, including the notice to place you on indefinite suspension and the notice proposing your removal from the rolls of the Postal Service which contained charges numbered 1, 2, and 3; the Findings of Fact report provided by the Hearing Officer in which a hearing

was held on January 3 and 4, 1974. A copy of the Findings of Fact is enclosed herewith for your reference. Consideration has also been given to the statements contained in the post-hearing briefs submitted by both parties received on January 16 and 18, 1974 and submitted by the representative of the Postal Service and that of Mr. John M. Sink, Attorney respectively.

You are charged with, in brief, (1) misappropriation of air conditioner; (2) misappropriation of cassette recorder and (3) misappropriation of bookcase. Details of the three numbered reasons are contained in the advance notice of proposed discharge dated October 12, 1973. We did note that you have remained on the rolls in a non-pay status until disposition of your case through the appeal procedure.

In review of the total circumstances in this matter, I find that charges numbered 1, 2, and 3 are supported by a preponderance of record and are sustained. Based upon the sustained charges, the decision of the then Officer-In-Charge proposing your removal from the United States Postal

Service is hereby affirmed.

The indefinite suspension effected on September 22, 1973 is also sustained.

You may appeal this decision to the Senior Assistant Postmaster General, Employee and Labor Relations Group, United States Postal Service, Headquarters, Washington, D.C. 20260 within fifteen (15) days from receipt of this letter.

A signed copy of your appeal must be furnished to this office and the Postmaster, Santa Barbara Post Office.

Sincerely,

William J. Sullivan
Regional Postmaster General
Western Region

Attachment: Findings of Fact Report
cc: Mr. John M. Sink
Attorney at Law
1114 State Street, Suite 249
Santa Barbara, CA 93101

W. Daniel Clinton
Assistant Labor Attorney
Western Regional Headquarters
San Bruno, CA 94099

APPENDIX G
Administrative Letter Affirming Previous Affirmances of Petitioner's Suspension and Firing

UNITED STATES POSTAL SERVICE
U.S. MAIL
EMPLOYEE AND LABOR RELATIONS GROUP
Washington, DC 20260

May 10, 1974

Mr. Laymon W. Alsbury
5192 San Lucas Way
Santa Barbara, California 93111

Dear Mr. Alsbury:

I have reviewed the entire file in your appeal from the decision of the Regional Postmaster General, Western Region, to remove you from the Postal Service.

My decision was reached only after a thorough review of the complete appellate file. Consideration has been given to the decision to suspend you indefinitely as of September 22, 1973; the Notice of Proposed Adverse Action of October 12, 1973; the Notice of Removal of October 30, 1973, your appeal and request for a hearing by your attorney of November 7, 1973; the contentions made in your

behalf by Attorney John M. Sink; the Hearing Officers Report; and the decision of the Regional Postmaster General on March 25, 1974.

The objections of your attorney are also noted; however, it is not felt that any of these objections render the case fatally defective procedurally since you were afforded all of your rights under current applicable regulations.

In review of the entire file I find that Charges Numbered 1, 2 and 3 are supported fully and are sustained. The decision of the Regional Postmaster General sustaining your indefinite suspension and removal is here affirmed.

Sincerely,

W. Eudey
Assistant Postmaster General
Employee Relations Department

Postmaster General's Designee

APPENDIX H
Administrative Notification To Petitioner of Final Personnel Action

[Addressed to Laymon W. Alsbury; parts of this form omitted]

EMPLOYEE TO BE PAID FOR ALL ACCUMULATED ANNUAL LEAVE TO WHICH ENTITLED UNDER EXISTING LAW.
EMPLOYEE SEPARATED FROM THE POSTAL SERVICE AS CHARGES NUMBERED 1, 2 & 3 OF VIOLATION OF TITLE 18, SECTION 1707, U.S. CODE ARE SUSTAINED. INSPECTOR"S CASE # 83-63163
ITEM 23 INCLUDES $541 COLA
RELEASE FUNDS

/s/ William J. Sullivan
Regional Postmaster General
06/05/74

[This communication was later reworded, on June 20, 1974, to omit the statutory reference.]

APPENDIX I

Memorandum Opinion and Order For Summary Judgment of the District Court, Central District of California

"Alsbury v. U.S. Postal Service et al.", CV 74-1610-AAH (Filed April 1, 1975)

Plaintiff challenges the final decision of Assistant Postmaster General, Employee Relations Department, U.S. Postal Service, William Eudey, dated May 10, 1974, upholding both Plaintiff's suspension and removal from the Postal Service. In his Complaint, Plaintiff contends that his dismissal was violative of his Fifth Amendment rights of due process and double jeopardy and he seeks injunctive mandamus, declaratory relief, reinstatement, back pay and damages. The Postal Service bases its suspension and removal of Plaintiff on three charges[1] which allegedly justified removal "for such cause as will promote the efficiency of the service" under 5 U.S.C. §7501.

Plaintiff is a 31 year-old Postal employee who began working for the Postal Service 12 years ago. In approximately May or June of 1972, Plaintiff was appointed Assistant Postmaster in Mojave, California, and because of the illness

of the Postmaster, Plaintiff was subsequently appointed Officer-in-Charge (OIC) of the Mojave Post Office and Sectional Center. He was relieved as OIC on July 2, 1973 when a regular Postmaster was appointed. Plaintiff's request for transfer to the Santa Barbara Post Office was granted, effective July 21, 1973, and he reported for duty on August 14, 1973.

During the month of August, 1973, Postal Inspectors Alfred C. Howe and Charles H. Huggins conducted an inspection of the Mojave post office when they discovered that some property was missing, including an air conditioner, a tape recorder (cassette), and a small wooden bookcase. A custodial employee, Sam Mitchell, told the Postal Inspectors that he had assisted Plaintiff in loading the air conditioner aboard Plaintiff's truck in the latter part of June, 1973. Upon questioning of Plaintiff on August 23, 1973, in Santa Barbara, Plaintiff admitted having removed the air conditioner from the Mojave post office, saying it was "junk" which he intended to sell as surplus for the post office. Plaintiff gave the Postal Inspectors permission to remove the air conditioner from his garage and

signed a form authorizing the new Postmaster in Mojave to take the machine. However, when the Postal Inspectors went to Plaintiff's former home in Mojave, all of his personal belongings had already been shipped to storage in Santa Barbara. Although Plaintiff had told the Postal Inspectors that he did not recall taking a bookcase and cassette recorder, these two items, together with the air conditioner, had been found by the Postal Inspectors in storage at Santa Barbara.

Plaintiff was subsequently charged in Federal court with violating 18 U.S.C. §1707, Theft of Postal Property. As a result of a jury trial on December 19-20, 1973, Plaintiff was acquitted.

On September 20, 1973, Plaintiff received a notice of indefinite suspension dated the same date from Santa Barbara Post Office OIC, John M. Niles, in accordance with §444.32(e) of the Postal Service Manual, and on September 22, 1973, Plaintiff received Niles' decision of the same date to suspend Plaintiff indefinitely. Plaintiff appealed this suspension decision on October 5, 1973, to G.B. Hartsook, District Manager of the San Bernardino District Office of the Postal

Service. On October 12, 1973, Plaintiff was then sent a notice of removal from OIC Niles, and Plaintiff's counsel responded by letter on October 23, 1973. Plaintiff was then sent Niles' decision of October 30, 1973, to remove him effective November 16, 1973, and Plaintiff appealed this removal decision to Hartsook on November 7, 1973.

On December 27, 1973, Plaintiff received notice of hearing in which both his suspension and removal appeals were consolidated for hearing before Don Freebairn, Hearing Officer. A hearing was duly held on January 3-4, 1974 in Santa Barbara, California.[2] On January 30, 1974, Hearing Officer Freebairn's Findings of Fact and Recommendations affirming Plaintiff's suspension and subsequent removal were submitted to the Step I Officer, William J. Sullivan, Regional Postmaster General of the Western Region, pursuant to §444.341(a)(3)(e) of the Postal Manual. On March 25, 1974, Sullivan affirmed Freebairn's Findings and upheld both the suspension and removal of Plaintiff. Plaintiff filed a notice of appeal on April 8, 1974, and on May 10, 1974, Assistant Postmaster General

William Eudey affirmed Sullivan's decision. Plaintiff filed his Complaint in this District Court on June 10, 1974, and jurisdiction is predicated on 5 U.S.C. §§702 and 703; 39 U.S.C. §§401(1) and 409(a); and 28 U.S.C. §§1331 (Federal question), 1339 (Postal matters), and 1343(4) (civil rights). The Court is now presented with cross motions for summary judgment by both Plaintiff and Defendants.

Plaintiff bases his motion for summary judgment on two grounds: (1) that the acquittal of Plaintiff in December, 1973, is binding on the Postal Service; and (2) that Plaintiff's suspension without a prior hearing was arbitrary and capricious and a denial of due process. Defendants oppose these contentions and move for summary judgment on the grounds, inter alia, that there is substantial evidence in the administrative record to support the Plaintiff's suspension and removal, and, further, that Defendants have substantially complied with all the required procedural steps.

The scope of judicial review of actions of administrative agencies is narrow. Traditionally, judicial review has been limited to "a determination of

whether the required procedural steps have been substantially complied with." Seebach v. Cullen, 338 F.2d 663, 664 (9th Cir. 1964). See also Benson v. United States, 421 F.2d 515, 517 (9th Cir. 1970), citing Seebach with approval. The test to be applied in such cases is whether the agency's action was arbitrary, capricious or an abuse of discretion. Brancadora v. Federal National Mortgage Ass'n., 344 F.2d 933 (9th Cir. 1965); Robinson v. Blount, 472 F.2d 839 (9th Cir. 1973); Seebach v. Cullen, supra.

More recently, however, the trend has been to enlarge the judicial review test to require a judicial finding that the agency's factual determinations were and are "supported by substantial evidence." The test to be used was thus formulated by the Tenth Circuit in Vigil v. Post Office Department, 406 F.2d 921, 924 (10th Cir. 1969):

> "(I) Were the procedural requirements of the statutes and regulations complied with; and (II) was the action of the department officials arbitrary or capricious or not supported by substantial evidence."

See also Toohey v. Nitze, 429 F.2d 1332 (9th Cir. 1970); Gray v. Macy, 358 F.2d 742 (9th Cir. 1966); Carr v. United States, 337 F. Supp. 1172 (N.D. Cal. 1972).

As we said in Rubio v. Hampton, 334 F. Supp. 218, 221 (C.D. Cal. 1974):

> "We believe the . . . cases articulating the 'substantial evidence' test, as well as applying the 'arbitrary or capricious' and 'procedural requirements' tests, the better as well as the newer view."

With this standard of judicial review in mind, the Court now considers Plaintiff's first contention that the acquittal in the criminal case is binding on the Postal Servcie. We search in vain for any authority to support this contention. In fact, the weight of authority is solidly to the contrary as long as there is substantial evidence to support the grounds for removal. See Finfer v. Caplin, 344 F.2d 38 (2d Cir. 1965); Croghan v. U.S., 89 F. Supp. 1002 (Ct. Cl. 1950); and Kowal v. U.S. 412 F.2d 867 (ct. Cl. 1969). The reasoning underlying these cases apparently rests on the different standards of proof to be applied

in criminal cases and in government employee civil removal cases.

Since the grounds for removal must be, according to 5 U.S.C. §7501, "for such cause as will promote the efficiency of the service," the burden of proof on the employing agency necessarily is less than the standard of "beyond a reasonable doubt" that is applied in criminal cases. Also, the employing agency, as well as the government employee, is entitled to an independent hearing and review of the evidence to determine whether continued employment is in the best interests of the government agency and the employee. Certainly, the agency, in making its own determination, cannot be constrained to blindly follow the results of a criminal trial which has a stricter standard of proof and far different consequences for the employee. This is not to say that an agency should totally ignore the results of a criminal trial of its employee, but rather that it should consider all of the evidence concerning the charges made. It is clear from the analysis and study of the complete record in this case that Plaintiff fully apprised the Postal Service of his acquittal,[3]

but that the Service nevertheless had much more than substantial evidence to support the charges.

Plaintiff's second contention that his indefinite suspension, without a prior hearing was arbitrary and capricious and a denial of due process, is also without merit. Section 444.221(e)[4] of the Postal Service Manual provides an exception to the general rule of at least 30 days' notice before suspension occurs. Plaintiff had been indicted by a Federal Grand Jury in Fresno on September 13, 1973, and the first investigative summary from Postal Inspectors Howe and Huggins had been submitted to OIC Niles on September 14, 1973. Therefore, it is apparent that the Postal Service had "reasonable cause to believe an employee guilty of a crime for which a sentence of imprisonment may be imposed" within the meaning of §444.221(e) of the Postal Service Manual in makings its decision to suspend Plaintiff indefinitely.

Plaintiff also makes much of the fact that Postmaster Sullivan's delay in issuing a decision constitutes a violation of due process.[5] The law is clear, however, that when Plaintiff alleges any

procedural defects he must also show that the delay was unreasonable and prejudicial to his case. As the Court stated in Pauley v. U.S., 419 F.2d 1061, 1067 (7th Cir., 1969):

> "We have carefully examined the administrative record and are convinced that no unreasonable delay occurred and the delay that existed was not prejudicial to plaintiff. This assertion of prejudicial delay is without merit."

We are likewise convinced that Sullivan's failure to comply with §444.241(a)(3)(e) to the letter was not unreasonable nor is there any showing of resultant prejudice to the Plaintiff. Cohen v. U.S., 369 F.2d 976, 988 (Ct. Cl. 1966); Pauley v. U.S., supra.

The Court has considered all of the remaining points argued by Plaintiff and finds them without merit. Having exhaustively considered and reviewed the pleadings, the administrative record and transcript of the hearing, the Court now finds that the record impressively demonstrates that there is no genuine issue as to any material fact and that the Defendants are entitled to judgment as a

matter of law. We further find that the factual determinations made by the Postal Service are supported by substantial evidence; that Plaintiff's suspension and removal were not arbitrary, capricious or an abuse of discretion; and that Plaintiff's suspension and removal were "for such cause as will promote the efficiency of the service." 5 U.S.C. §7501.

The Court therefore denies Plaintiff's motion of summary judgment and grants summary judgment for Defendants.

The foregoing Memorandum Opinion shall constitute Findings of Fact and Conclusions of Law as provided in Rule 52, Fed. R. Civ. P.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 1, 1975

/s/ A. ANDREW HAUK

UNITED STATES DISTRICT JUDGE

FOOTNOTES

Footnote 1

The three charges, as more fully set out in OIC Niles' notice of removal of October 12, 1973, to Plaintiff, are as follows:

"1. Misappropriation of Air

Conditioner.
During the month of June 1973 you unlawfully removed from the custody of the U.S. Postal Service at Mojave, CA, a Fedders Air Conditioning Unit, Serial #HE639028.

2. Misappropriation of Cassette Recorder.
During the period of time that you were Officer in Charge at the Mojave, CA Post Office, which was from October 5, 1972 through July 2, 1973, you unlawfully removed from the custody of the U.S. Postal Service at Mojave, CA, a Realistic Cassette Recorder.

3. Misappropriation of Bookcase.
During the period of time that you were Officer in Charge at the Mojave, CA Post Office,which was from October 5, 1972 through July 2, 1973, you unlawfully removed from the custody of the U.S. Postal Service at Mojave, CA, a wooden

bookcase."

Footnote 2

The Postal Service called six witnesses and Plaintiff called two of his own. The transcript of the administrative hearing was tape recorded and later transcribed. This transcript, the entire administrative record and the pleadings herein have been thoroughly reviewed by the Court.

Plaintiff draws our attention to the hearing transcript to argue that the numerous gaps in the testimony somehow works a denial to Plaintiff of Fifth Amendment Due Process protection. (See the second affidavit of Plaintiff's counsel filed in opposition to Defendants' motion for summary judgment.) Although the Court notes that the transcript is a poor one, we are not convinced, nor has Plaintiff shown, that the gaps omit any substantial evidence crucial to Plaintiff's case. In fact, Plaintiff's counsel, in paragraph 8 of his same affidavit mentioned hereinabove, admits that despite the alleged defects, the transcript fully supports Plaintiff's recitation of the testimony given at the hearing.

We therefore find no merit in Plaintiff's due process claim challenging

the transcript.

Footnote 3

See, e.g., Plaintiff's opening argument made at the administrative hearing before the Hearing Officer, Transcript of Hearing, January 3-4, 1974, p. 10, and the letters of Plaintiff's counsel to the Postal Service dated March 25, 1974, and April 8, 1974.

Footnote 4

This section reads as follows: "Exception - When there is reasonable cause to believe an employee guilty of a crime for which a sentence of imprisonment may be imposed, the advance notice requirement shall be reduced to 24 hours. The employee shall have the ooportunity to answer the letter of proposed action within that 24-hour period. At the expiration of the 24-hour period a letter of decision shall be issued forthwith. Thereafter the employee shall remain on the rolls in a non-pay status until a final administrative decision is made regarding his employment status with the Postal Service."

Footnote 5

See Plaintiff's counsel's letters of February 22, 1974, and March 25, 1974.

The latter charged that Regional Postmaster Sullivan's delay was a result of Hearing Officer's Freebairn's recommendations favorable to Plaintiff, and that the Postal Service had "dragged this out past all reason" beyond the limits of due process safeguards. But see Sullivan's response of April 4, 1974 and his affidavit filed in support of Defendants' motion for summary judgment in which he states at paragraph 5 that "No other information, oral or documentary, not contained in those documents identified above, was considered as a basis for the decision issued on March 25, 1974." We give full faith and credit to this affidavit when opposed only by the speculative allegations of Plaintiff. Nor is there any evidence that the delay was deliberate or prejudicial to Plaintiff, as we point out more fully infra in our Memorandum Opinion.

APPENDIX J

Opinion of Ninth Circuit Court of Appeals "Alsbury v. U.S. Postal Service, et al.", No. 75-2138 (Filed March 1, 1976)

Before: GOODWIN and SNEED, Circuit Judges, and JAMESON, District Judge.

SNEED, Circuit Judge:

Plaintiff-appellant was suspended and subsequently discharged from his position with the United States Postal Service. After the Regional Postmaster General and Assistant Postmaster General affirmed the suspension and discharge, appellant filed suit in the District Court, seeking reinstatement, back pay, and other appropriate relief. Summary judgment was granted in favor of defendants-appellees. We affirm.

A brief discussion of facts is helpful in understanding appellant's arguments on appeal. Appellant removed several items of postal property from the Mojave, California Post Office when his employment was transferred from that office to theSanta Barbara Post Office. He was subsequently charged with theft of postal property, a violation of 18 U.S.C. §1707. Appellant was then suspended from employment, effec-

tive September 22, 1973, by the Officer-in-Charge of the Santa Barbara Post Office. The suspension was in compliance with Postal Service regulations allowing immediate suspension of an employee when there is reasonable cause to believe he is guilty of a crime for which imprisonment will result.[1] Appellant was subsequently discharged from employment, effective November 16, 1973, by the Officer-in-Charge. Appellant filed administrative appeals from the suspension and discharge decisions.

As a result of a jury trial held on December 19-20, 1973, appellant was acquitted of the criminal charges against him. Appellant's appeals to postal authorities were consolidated and an evidentiary hearing was held on January 3-4, 1974. The hearing officer prepared findings of fact and recommendations, and forwarded these items to the Regional Postmaster General of the Western Region. The Regional Postmaster General, on March 25, 1974, affirmed the Hearing Officer's findings and upheld appellant's suspension and removal. Appellant appealed this decision, and the suspension and discharge were again affirmed by the Assistant

Postmaster General on May 10, 1974. Appellant then sought judicial review of his dismissal.

We previously have held that judicial review of dismissal from federal employment is limited to a determination that the applicable procedures have been complied with and that the dismissal was supported by substantial evidence and was not arbitrary and capricious. Taylor v. United States Civil Service Commission, 374 F.2d 466 (9th Cir. 1967); Seebach v. Cullen, 338 F.2d 663 (9th Cir. 1964). These limits are applicable to our review of a discharge from the Postal Service. See Vigil v. Post Office Department of the United States, 406 F.2d 921 (10th Cir. 1969). No contention has been made that transformation of the Department to the Postal Service alters these limits.[2]

Appellant directs most of his fire towards the alleged failure of the Postal Service to comply with proper procedures in effectuating his suspension and discharge. He also contends that the decisions to suspend and subsequently to discharge were improper because they were made by a person so involved in the case as to be incapable of impartiality. We

believe these contentions are foreclosed by Arnett v. Kennedy, 416 U.S. 134, reh. den., 417 U.S. 977 (1974), which held procedures similar to those employed here not violative of a federal employee's due process rights.[3] The Supreme Court expressly held that a pre-dismissal trial-type hearing was not constitutionally required. Nor did it suggest that suspension or discharge when done by one familiar with the employee's work was constitutionally flawed. There is no escape from the conclusion that the procedures about which the appellant now complains, authorized as they were by the Postal Service Manual, do not deprive the appellant of his constitutional rights.

Appellant's contention that the decisions resulting from his administrative appeals were so delayed as to deprive him of due process fares no better. See Pauley v. United States, 419 F.2d 1061, 1067 (7th Cir. 1969); Cohen v. United States, 369 F.2d 976, 988 (Ct. Cl.), cert. denied, 387 U.S. 917 (1966). Delays attending administrative appeals of the type involved here are irritating and, if extended unreasonably, can amount to a deprivation of constitutional due process.

The delay here falls considerably short of that mark.

To support the assertion that the discharge was arbitrary and capricious the appellant points to his acquittal in the prosecution for theft of postal property and contends that it precludes a dismissal based on misappropriation of property, the theft of which was not proven in the criminal proceedings. More precisely, the appellant argues that the Postal Service is collaterally estopped "to relitigate" the issue through suspension and discharge procedures. The argument fails. While perhaps it can be said that the parties to the criminal trial and the suspension and discharge proceedings are the same (although the Postal Service and the United States are not precisely identical), it is obvious that the issue determined in the criminal trial was different from that decided in the discharge proceeding and that the burden of proof in the two was different. The issue in the criminal trial was whether the defendant was guilty of theft of postal property; that in the discharge proceeding was whether certain property had been unlawfully removed from the custody of the Postal Service.

In the criminal trial the Government must prove its case beyond a reasonable doubt, while in a discharge proceeding proof based on a preponderance of the evidence is sufficient. These distinctions have been recognized by other courts when confronted by a contention such as the appellant makes. See Kowal v. United States, 412 F.2d 867, 870 (Ct. Cl. 1969); Finfer v. Caplin, 344 F.2d 38, 41 (2d Cir.), cert. denied, 382 U.S. 883 (1965). Acquittal thus does not make the dismissal arbitrary. To hold otherwise would impose a barrier to Postal Service improvement which properly should function only to prevent a deprivation of liberty. Cf. Croghan v. United States, 89 F. Supp. 1002, 1004 (Ct. Cl.), cert. denied, 340 U.S. 854 (1950).

The last contention of the appellant which merits attention is that the granting by the district court of summary judgment on behalf of the Postal Service prevented him from developing his case through discovery and particularly from deposing the Regional Postmaster who may have improperly considered ex parte evidence in reaching his conclusions. A mere suspicion that improper evidence was

considered, contradicted by an affidavit of the Regional Postmaster (which was considered by the district court and is a part of the record of this case) does not constitute "a genuine issue of material fact" which serves to defeat a motion for summary judgment. FED. R. CIV. P. 56(c). See Mann v. Klassen, 480 F.2d 159, 161 (5th Cir. 1973); DeLong v. Hampton, 422 F.2d 21, 26 (3rd Cir. 1970).

These conclusions and our review of the record convince us that the appellant's dismissal was supported by substantial evidence and thus was neither arbitrary nor capricious. Moreover, the applicable procedures were complied with and are not contrary to the Fifth Amendment. The judgment of the District Court is affirmed.

AFFIRMED.

Footnote 1

Postal Service Manual § 444.221e.

Footnote 2

Although the issue was not specifically argued on appeal, we note that the abolition of the Post Office Department and the creation of the Postal Service apparently did not alter the legal standards under which discharge proceedings are to be

evaluated. 39 U.S.C. §1005(a)(1) provides that:

> "Except as otherwise provided in this Subsection, the provisions of Chapter 75 of title 5 (5 U.S.C. §§7501-7533) shall apply to officers and employees of the Postal Service except to the extent of any discrepancy with--(A) the provisions of any collective-bargaining agreement negotiated on behalf of and applicable to them; or (B) procedures established by the Postal Service and approved by the Civil Service Commission."

The standards for discharge and the existing case law associated with 5 U.S.C §7501 provides in part that discharge may be "for such cause as will promote the efficiency of the service."

Footnote 3

The Postal Service regulations found in Part 444 of the Postal Service Manual provide that an employee shall receive 30 days' notice of any adverse action against him, along with instructions for responding to the notice. (Postal Service Manual §444.221a; similar Civil Service regulation found at 5 CFR §752.202(a) and cited in Arnett v. Kennedy, 416 U.S.

134, 143, n.9). The notice period may be reduced to no less than 24 hours when there is reasonable cause to believe that an employee may be guilty of a crime for which imprisonment may result. (§444.221e) The employee may respond to the notice of adverse action either orally or in writing. (§444.221b; compare 5 CFR 752.202(b) cited in Arnett at p. 143, n.10) The decision on the adverse action must include the reasons therefor and must notify the employee of his right to appeal. (§444.221c; compare 5 CFR §752.202(f) cited in Arnett at p. 144, n.11)

The employee may appeal an adverse decision by submitting a request for an evidentiary hearing to the "Step I Official" (in this case, the Regional Postmaster General) within 15 days after an adverse decision becomes effective. (§444.241a(1); compare 5 CFR §752.203 cited in Arnett at p. 145, n.13) The hearing is to be conducted by a Hearing Officer who must prepare a summary, findings of fact, and an analysis, which are to be forwarded to the Step I Official for final decision. (§444.241a(3); compare 5 CFR §772.305(c) cited in Arnett at pp. 147-48, n.14) Within 15 days of an ad-

verse Step I decision, an employee may appeal to the Postmaster General (Step II) (§441.241b)

The above specifications for notice, hearing procedure, and appeals procedure are substantially the same as those set forth by the Civil Service Commission and approved in Arnett. The Arnett regulations also provided specifically that an employee has no right to a formal evidentiary hearing before the initial decision on an adverse action. (5 CFR §752.202 (b); see Arnett, pp. 143-44, n.10) Although the regulations as described in Arnett did not provide for a reduced notice period upon reasonable suspicion of criminal activity, we do not find that variation from the Arnett regulations to be substantial or unreasonable.

Supreme Court, U. S.
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No. 75-1746

In the Supreme Court of the United States

OCTOBER TERM, 1976

LAYMON WESLEY ALSBURY, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner was discharged from his employment with the Postal Service. He contends that his discharge hearing did not satisfy due process requirements and that his acquittal on criminal charges precludes the Postal Service from discharging him.

1. In June 1972 petitioner was appointed Assistant Postmaster in Mojave, California. Because the Postmaster became ill, petitioner served as Officer-in-Charge until July 2, 1973, when a regular Postmaster was appointed. Petitioner's request for transfer to the Santa Barbara Post Office was granted effective July 21, 1973; he reported for duty in Santa Barbara on August 14, 1973 (Pet. App. A-25 to A-26).

In August 1973 it was discovered that petitioner had removed an air conditioner, a tape cassette recorder and a wooden bookcase from his Mojave office shortly before

his transfer. Disciplinary action was instituted. On September 20, 1973, petitioner received a notice of proposed suspension, to which he had an opportunity to respond (Pet. App. A-1 to A-2). On September 22, 1973, he was advised that he would be suspended indefinitely (*id.* at A-3 to A-4), and a notice of proposed removal was furnished to him on October 12, 1973 (*id.* at A-5 to A-7). Petitioner filed a written response. On October 30 he was notified that he would be removed as of November 16, 1973 (*id.* at A-8 to A-9).

Petitioner appealed both the suspension and the removal; the two appeals were consolidated for an adversarial hearing in January 1974, two weeks after petitioner had been acquitted of criminal charges arising from the appropriation of government property. The hearing examiner recommended affirming the suspension and removal (Pet. App. A-10 to A-18). After a "careful review * * * of the entire case file" (*id.* at A-19) the Regional Postmaster General found the charges to be "supported by a preponderance of record and are sustained" (*id.* at A-20).

Petitioner took a further administrative appeal. The Assistant Postmaster General affirmed, finding after a review of the complete appellate file that the charges "are supported fully and are sustained" (Pet. App. A-23). Petitioner then filed suit in the district court. Both the district court (392 F. Supp. 71; Pet. App. A-25 to A-39) and the court of appeals (Pet. App. A-40 to A-49) upheld his suspension and discharge.

2. Petitioner's claim that the administrative process did not afford him due process of law is incorrect. As the court of appeals observed (Pet. App. A-47 to A-49), the Postal Service regulations are similar to those upheld in *Arnett* v. *Kennedy*, 416 U.S. 134. Petitioner was given notice of his proposed suspension and discharge; he had an opportunity to respond and to review the material

relied on to support the disciplinary action. He had a full adversarial hearing. The administrative determination was based on a finding that the charges were supported by a "preponderance" of the evidence (Pet. App. A-20):

Petitioner suggests that a "preponderance" of the evidence is not different from a decision based on "substantial" evidence (Pet. 24), and that a decision supported only by "substantial" evidence would be defective. But proof by a prépondérance of the evidence entails more than proof by substantial evidence. *Virgin Islands Labor Union* v. *Caribe Construction Co.*, 343 F. 2d 364 (C.A. 3); *Sherman* v. *Lawless*, 298 F. 2d 899 (C.A. 8). In any event, whatever words are used to characterize the evidentiary burden, the Constitution does not draw so fine a line. Petitioner received his due—an opportunity to put his version of the facts before the administrative tribunal.[1] *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976.

3. Nor was the Postal Service bound by petitioner's acquittal on the criminal charge of misappropriating the property in question. Petitioner's argument is foreclosed by *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232.

Coffey v. *United States*, 116 U.S. 436, upon which petitioner relies (Pet. 27), is not to the contrary. *Coffey* was a civil action, brought after acquittal on criminal charges, and involving the same "act, attempts and intent" as the criminal action (116 U.S. at 442). *Stone* v. *United States*, 167 U.S. 178, made it clear that *Coffey* does not deal with

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[1]Petitioner's argument that the officer who brought the charges against him was biased is unsupported; the record shows only that the officer was affected by the natural weight of the evidence against petitioner. Cf. *Arnett* v. *Kennedy*, *supra*; *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, No. 74-1606, decided June 17, 1976.

a civil case in which the actor's intent is different from the intent necessary to support a verdict of guilt in the criminal case. See also *One Lot Emerald Cut Stones, supra,* 409 U.S. at 235 n. 5. In the present case the hearing examiner specifically stated that "misappropriation," the civil charge, is something less than "theft," the criminal charge (Pet. App. A-17), and that the criminal intent necessary for theft is not an element of proof in the discharge proceedings (*id.* at A-14). All recent decisions are in accord. *Polcover* v. *Secretary of the Treasury,* 477 F. 2d 1223, 1231-1232 (C.A. D.C.); *Finfer* v. *Caplin,* 344 F. 2d 38, 41 (C.A. 2), certiorari denied, 382 U.S. 883; *Taffel* v. *Hampton,* 463 F. 2d 251 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.